Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-322

UNITED STATES OF AMERICA,

Respondent,

vs.

GWYN J. JOHNSON and ~~DANIEL ABENDROTH, d/b/a GLOBAL INTERNATIONAL CORPORATION,~~

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Gwyn J. Johnson petitions for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit entered on June 2nd, 1978.

OPINION BELOW

The opinion of the Seventh Circuit Court of Appeals dated June 2, 1978 is printed in the Appendix at pp. 8-12.

JURISDICTION

Jurisdiction is conferred upon this Court by 28 USC, Section 1254.

ORDERS

The United States Court of Appeals for the Seventh Circuit affirmed Gwyn J. Johnson's conviction in the Federal District Court for the Eastern District of Wisconsin on June 2, 1978. The Defendant-Appellant, Gwyn J. Johnson's Petition for rehearing was denied by the United States Court of Appeals for the Seventh Circuit on July 24, 1978.

On August 1, 1978 the Defendant-Appellant Johnson moved the United States Court of Appeals for the Seventh Circuit for its Order to Stay Mandate.

STATUTE INVOLVED

18 USC, Section 1343:

"§1343. Fraud by wire, radio or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both. Added July 16, 1952, c. 879, §18(a), 66 Stat. 722, and amended July 11, 1956, c. 561, 70 Stat. 523."

QUESTIONS INVOLVED

1. Whether persons may be charged, tried, convicted, and sentenced under the federal wire fraud statute, 18 USC 1343 for breaching contracts, assuming arguendo, a showing of fraud in the breach?

2. Does the rationale presented in the case of *United States v. Maze,* 414 U.S. 395, 38 L. Ed. 26, 603 (1974) compel federal prosecutors to prove a close connection between the use of interstate wires and an artifice to defraud before a person may be convicted under the federal wire fraud statute, 18 USC 1343?

STATEMENT OF THE CASE

Gwyn J. Johnson was charged in the Eastern District of Wisconsin with one count of mail fraud in violation of 18 USC 1341, and one count of wire fraud in violation of 18 USC 1343.

Johnson, d/b/a Global International Corporation was in the business of seeking out and obtaining funding for commercial development projects. One of Johnson's clients was Consolidated Mine Management. This group was seeking financing for a mining venture in the Western United States. If Johnson was successful in having the project financed, he was to receive a brokerage fee plus royalties from the mines.

Johnson agreed to sell a percentage of his interest in this mining venture to three businessmen. In return Johnson was to receive a $20,000.00 advance from the three men. The money was to be used for the express purpose of defraying certain expenses involved in Johnson's efforts to obtain financing for the mining project. A letter was mailed to Johnson at his corporate office memorializing the agreement and the money was wired from Milwaukee, Wisconsin to Johnson's bank in Neenah, Wisconsin.

After long and extensive efforts to arrange the desired financing for the mining venture, the deal fell through.

Johnson was unable to return the $20,000.00 to the three businessmen. It was later shown at Johnson's trial that Johnson had breached the contract he had with the three businessmen by using the $20,000.00 for his own personal expenses which were incurred as a result of his efforts to obtain funding for the mining venture. The money was not used solely for those express purposes as called for by the letter memorializing the contract.

In a trial to the Court before the Federal District Court for the Eastern District of Wisconsin, Johnson was convicted of wire fraud. However, pursuant to the cases of *United States v. Maze,* 414 U.S. 395, 38 L. Ed. 2d 603 (1974) and *United States v. Britzman and Rubin,* 547 F.2d 380 (7th Cir. 1977), the Trial Court concluded that the United States failed to establish a sufficient connection between the use of the mails and the alleged fraudulent scheme. Therefore a conviction under the federal mail fraud statute was not warranted.

On appeal to the United States Court of Appeals for the Seventh Circuit, that Court affirmed the District Court decision. The Seventh Circuit held in effect that Johnson had misrepresented the purposes for which he would use the $20,000.00 and that this money had been transferred by use of wire communications. The Seventh Circuit concluded that these facts alone were sufficient to constitute a federal offense of wire fraud.

REASONS FOR GRANTING THE WRIT

Gwyn J. Johnson's conviction under 18 USC 1343, Fraud by Wire, constitutes an ill-conceived use of the federal criminal code. The Seventh Circuit's affirmance of this conviction was an approval of a gross misapplication of the federal wire fraud statute. If this decision

stands, it will be judicial authorization for the United States Attorney's Office to become the final arbiter of the business relationships between private citizens. Certainly, this is not a proper role for either the federal prosecutors or the federal courts.

The basic facts of this go undenied. Johnson entered into a contract wtih three other parties whereby he would receive $20,000.00; in return the others would receive a share of Johnson's interest in a mining venture. The money was subsequently transferred by wire. The mining venture in which the three were to gain an interest was legitimate. The United States in prosecuting this case has never contended that Johnson induced his three "victims" into investing in a worthless scheme. Further, the trial record is replete with testimony and physical evidence proving that Johnson made protracted efforts to bring the contract to a fruitful conclusion. Had Johnson been successful, his three "victims" would have shared handsomely in the profits.

Johnson's only offense was that when he entered into the contract with the three other parties, he allegedly agreed to use the $20,000.00 in a specified manner. He breached this agreement by using the money for his own personal expenses. The Trial Court concluded that he had misrepresented the intended use of the money, and because the money had originally been wired, Johnson was guilty of wire fraud.

This case stands in stark contrast to other cases tried under the federal mail and wire fraud statutes. Usually the offender has maintained false personal or business identities; often the offender creates the mirage of a sound business; falsified financial statements are used to mislead the innocent; money is taken or received by the

perpetrator who then leaves for parts unknown. See *United States v. Powers,* 467 F.2d 1089 (7th Cir., 1972); *Henderson v. United States,* 425 F.2d 134 (5th Cir., 1970); *United States v. Crisona,* 416 F.2d 107 (2nd Cir., 1969).

In comparison the case at bar evidences a straightforward business transaction among four competent and aware businessmen. Johnson never deceived anyone about the risks involved. The persons allegedly victimized by Johnson invested $20,000.00 in an enterprise they knew to be ripe with hazard. Only after their money was lost did they begin to cry "wolf". After a lengthy federal investigation, it was determined that Johnson's single misdeed was to spend the money in a fashion that was inconsistent with the terms of the original contract. Surely, these facts are not a sufficient foundation for federal criminal jurisdiction. The State of Wisconsin provides ample remedies for breach of contract and civil fraud. The intervention of the Justice Department in this case is an unfortunate example of a federal court overstepping the proper bounds of its jurisdiction.

In addition to the foregoing argument, it is to be noted that the Court of Appeals' decision in this case conflicts with the principles enunciated in *United States v. Maze,* 414 U.S. 395, 38 L. Ed. 2d 603 (1974). Therein this Court held that before a person can be convicted on a federal mail fraud charge, there must be a sufficiently close connection between the use of the mail and the alleged fraud. The Seventh Circuit has acknowledged this principle in *United States v. Britzman and Rubin,* 547 F.2d 380 (7th Cir., 1977). By analogy this principle should apply to federal wire fraud cases.

In this case the Government failed to show this close relationship. Admittedly the money was transferred by

wire, but was never shown that this use of the wires was anything more than an incidental arrangement to a bona fide business transaction.

The most significant aspect of this case, and the reason it merits review by the Supreme Court, is the Seventh Circuit's failure to fashion some logical limit to the application of the federal wire fraud statute. This decision evidences an utter disregard for the need to distinguish those cases which are nothing more than a breached contract from those cases which are truly federal offenses. The case of *United States v. Gwyn Johnson,* as it now stands, will turn almost every business deal gone sour into a federal case. It is imperative that the Supreme Court formulate a reasonable limit on federal jurisdiction in cases of this nature. If the Court does not do so, this case will stand as an albatross hovering over the heads of the federal courts and American business.

CONCLUSION

On the basis of the foregoing argument, and the reasons set forth, I respectfully request that this Court grant its Writ of Certiorari.

Respectfully submitted,

FRANKLYN M. GIMBEL
Attorney for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

ARGUED MAY 25, 1978
June 2, 1978
Before

HON. ROBERT A. SPRECHER, Circuit Judge
HON. HARLINGTON WOOD, JR., Circuit Judge
HON. WILLIAM J. CAMPBELL,
Senior District Judge*

UNITED STATES OF AMERICA, Plaintiff-Appellee, No. 77-2176 vs. GWYN J. JOHNSON d/b/a GLOBAL INTERNATIONAL CORPORATION, Defendant-Appellant.	Appeal from the United States District Court for the Eastern District of Wisconsin. No. 77-CR-52 Myron L. Gordon, *Judge.*

ORDER

The issues in this appeal are whether the district court properly applied the federal wire fraud statute and whether the evidence produced at trial was sufficient beyond a reasonable doubt to convict defendant.

I

The defendant, Gwyn M. Johnson, and his son-in-law, Daniel Abendroth, were charged in a two-count indictment with the alleged use of the mails and wire communications in furtherance of a fraudulent scheme to obtain a $20,000 advance fee from George Whitney of Florida, and Victor Weiss and Lawrence Lubotsky of Milwaukee, Wisconsin. Johnson was convicted of fraud by use

of wire, 18 U.S.C. §1343, and Abendroth was acquitted of the same charge. Defendants' motion to dismiss the mail fraud charge, 18 U.S.C. §1341, was granted.

Whitney was seeking financing for a condominium project. Defendant Johnson indicated to Whitney that he might secure financing from a financing group in London called Capital Funding. Subsequently, Johnson informed Whitney that he was in the final stages of getting funding for a separate project involving a mining venture. First, however, Johnson needed to raise $20,000 to cover expenses. Whitney and two of his associates agreed to fund the money in return for a portion of Johnson's interest. Weiss wired $20,000 to the bank account of Johnson's corporation, Global International, at the First National Bank of Neenah, Wisconsin. Weiss also mailed a letter to Global International setting out the terms of the agreement. The letter was signed by Abendroth and returned to Weiss.

The mining project did not receive funding and the $20,000 was not returned. It is upon these basic facts that Johnson was convicted of wire fraud. Since defendant challenges the sufficiency of the evidence, more details of the transaction will be discussed subsequently. Defendant appeals from his conviction.

II

Defendant argues that, assuming a fraudulent scheme existed, the Government failed to show a sufficient use of wire communications to constitute a violation of the wire fraud statute. Accepting that the use of interstate wire communications must be "sufficiently closely related" to, *United States v. Maze,* 414 U.S. 395, 399 (1974), or "incident to an essential part of the scheme," *Pereira v. United States,* 347 U.S. 1, 8 (1954), to constitute a violation of the statute, we agree with the district court that a sufficient nexus has been shown.

The wire transfer of the $20,000.00 was an important portion of the scheme. Without the wire transfer, the scheme would have remained incomplete and therefore was crucial to the execution of the fraud itself. In addition, the wire transfer was pursuant to the express directions of the defendants (Tr. at 25). Under these circumstances, there was sufficient connection between the use of wire communication and the fraudulent scheme to constitute a violation of the wire fraud statute.

Defendant argues further, however, that since the mail fraud was dismissed for lack of a sufficient nexus of the mails with the fraudulent scheme, the same result must follow for the wire fraud charge. We disagree with the defendant for two reasons. First the argument assumes not only that the same standards apply under both statutes, but also that the district court was correct in concluding that the mail fraud charge must be dismissed. Accepting that the standards for the two statutes are the same, we think that merely because a claim under one was dismissed does not mean that a charge under the other has no viability. Whether or not the mail fraud count was sufficient is not before us and, as we have noted, the connection between the use of wire communications and the fraud was sufficient to violate the statute.

Second, and more fundamentally, we do not view the use of the mails here as being nearly as important to an essential part of the scheme as was the use of wire communications. The wire transfer of the money was necessary to complete the scheme whereas the only use of the mails was a memorandum of agreement sent from Weiss to Global International. Not only was the use of the mails not contemplated or directed by defendant, but, as we shall discuss shortly, the defendant no doubt would have preferred Weiss not to have memorialized the agreement between the parties and not have mailed it to defendant. Thus, the district court properly applied the

wire fraud statute and concluded that the use of wire communications was sufficient to violate the statute.

III

Defendant also challenges the sufficiency of the evidence that a fraudulent scheme existed. In reviewing the sufficiency of the evidence, we view the evidence and the inferences reasonably drawn therefrom in a light most favorable to the Government. *Glasser v. United States,* 315 U.S. 60, 80 (1942); *United States v. Cardi,* 478 F.2d 1362 (7th Cir. 1973).

The heart of the fraudulent scheme was the representation by Johnson that the money advanced would be used only for the purpose of a geological investigation of the mineral deposits and would be refunded if the project fell through (Tr. at 24). This agreement was spelled out in a letter (Government Exhibit 2) from Weiss to Global International that stated, in part:

> It is understood that these funds are to be taken in trust by you and to be used only for the puurpose of defraying expenses of an investigating team, being sent here by the lender, to inspect the above mentioned gold mine, silver mines and mineral deposits before final approval of lender, relating to loan applied for relating to same and for no other purposes.

The $20,000 was not kept in trust and the funds were used immediately upon receipt for defendant's personal needs and expenses in total contravention of the agreement. In addition, Global International, through defendant's son-in-law Abendroth, signed and returned the written memorandum from Weiss. Throughout, defendant continued to represent that the monies were being held in escrow (Tr. at 156, 158, 159), contrary to the

facts. Under these circumstances, we fully agree with the conclusion of the district court (Tr. at 395).

> The fact that Global International Corporation approved [the agreement] in writing, by signature of Mr. Abendroth approved that condition, coupled with the subsequent proof that again I think is irresistible, that the principals of the Global International Corporation withdrew the funds from this account, depleting the $20,000.00 for purposes utterly variant from that reflected in the conditions of the trust, demonstrates, in my judgment, that a scheme to defraud was contemplated by the defendant Johnson, and that the Government has met its burden of showing the necessary fraudulent intent and the execution of the scheme by causing Mr. Weiss to transfer by wire the sum of $20,000.00 to the Neenah Bank.

Therefore, for the reasons discussed above, the decision and judgment of the district court convicting defendant Johnson of wire fraud is in all respects affirmed.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604
July 24, 1978

Before
HON. ROBERT A. SPRECHER, Circuit Judge
HON. HARLINGTON WOOD, JR., Circuit Judge
HON. WILLIAM J. CAMPBELL,
Senior District Judge*

UNITED STATES OF AMERICA, Plaintiff-Appellee, No. 77-2176 vs. GWYN J. JOHNSON, d/b/a GLOBAL INTERNATIONAL CORPORATION, Defendant-Appellant.	Appeal from the United States District Court for the Eastern District of Wisconsin. No. 77-CR-52 Myron L. Gordon, *Judge.*

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by Defendant-Appellant, Gwyn J. Johnson, d/b/a Global International Corporation, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing *en banc* be, and the same is hereby, DENIED.

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* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.